

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MY M. PHENGSAVANH,
Plaintiff,
v.
CAROLYN COLVIN, Acting
Commissioner of Social Security,
Defendant.

No.: 4:15-CV-5018-EFS

**ORDER GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION AND
DENYING PLAINTIFF'S SUMMARY-
JUDGMENT MOTION**

CAROLYN COLVIN, Acting
Commissioner of Social Security,
Defendant.

Before the Court, without oral argument, are two cross-summary-judgment motions. Plaintiff My M. Phengsavanh appeals the Administrative Law Judge's (ALJ) denial of benefits on the grounds that the ALJ failed to fully consider the treating, examining, and non-examining physicians' opinions and find Mr. Phengsavanh credible. ECF No. 12. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision that Mr. Phengsavanh is capable of performing substantial gainful activity in a field for which a significant number of jobs exist in the national economy. After reviewing the record and relevant authority, the Court is fully informed. For the reasons set forth below, the Court affirms the ALJ's decision and therefore denies Mr. Phengsavanh's motion and grants the Commissioner's motion.

1 **A. Statement of Facts and Procedural History¹**

2 Following suffering an injury during his employment and resulting
3 physical and mental diagnoses, Mr. Phengsavanh filed for disability
4 insurance benefits, alleging an onset date of May 1, 2012. His initial
5 application was denied.

6 Mr. Phengsavanh requested a hearing before an ALJ; the ALJ issued
7 an order denying benefits on September 25, 2014. ECF No. 9 at 21-37. The
8 ALJ considered the medical records and reports prepared by Mr.
9 Phengsavanh's treating and examining physicians, including Dr. Thomas
10 Dillon, Dr. Naughne Boyd, Dr. Martin Koretzky, and Dr. Elliott Rotman,
11 and non-examining physician Dr. Thomas McKnight's opinion. Although the
12 ALJ determined that Mr. Phengsavanh suffers a left knee meniscus tear,
13 major depressive disorder, posttraumatic stress disorder (PTSD), and
14 pain disorder associated with both psychological factors and a general
15 medical condition, the ALJ determined that these impairments did not
16 equal the severity of a listed impairment and did not preclude Mr.
17 Phengsavanh from working jobs that exist in significant numbers in the
18 national economy. Mr. Phengsavanh filed a request for review with the
19 Appeals Council, which was denied.

20 Mr. Phengsavanh filed this lawsuit, appealing the ALJ's decision.
21 Thereafter, the parties filed the instant summary-judgment motions.

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¹ The facts are only briefly summarized. Detailed facts are
24 contained in the administrative hearing transcript, the ALJ's decision,
25 the parties' briefs, and underlying records.

1 **B. Disability Determination**

2 A "disability" is defined as the "inability to engage in any
3 substantial gainful activity by reason of any medically determinable
4 physical or mental impairment which can be expected to result in death
5 or which has lasted or can be expected to last for a continuous period
6 of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A),
7 1382c(a)(3)(A). The decision-maker uses a five-step sequential
8 evaluation process to determine whether a claimant is disabled. 20
9 C.F.R. §§ 404.1520, 416.920.

11 Step one assesses whether the claimant is engaged in substantial
12 gainful activities during the relevant period. If she is, benefits are
13 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the
14 decision-maker proceeds to step two.

15 Step two assesses whether the claimant has a medically severe
16 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),
17 416.920(c). If the claimant does not have a severe impairment or
18 combination of impairments, the disability claim is denied. If the
19 impairment is severe, the evaluation proceeds to the third step.
20

21 Step three compares the claimant's impairment with a number of
22 listed impairments acknowledged by the Commissioner to be so severe as
23 to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404
24 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of
25 the listed impairments, the claimant is conclusively presumed to be
26 disabled. If the impairment does not meet or equal one of the listed
27 impairments, the evaluation proceeds to the fourth step.
28

Step four assesses whether the impairment prevents the claimant from performing work she has performed in the past. This includes determining the claimant's residual functional capacity. 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant is able to perform her previous work, she is not disabled. If the claimant cannot perform this work, the evaluation proceeds to the fifth step.

Step five, the final step, assesses whether the claimant can perform other work in the national economy in view of her age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); see *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The burden of proof shifts during this sequential disability analysis. The claimant has the initial burden of establishing a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if she establishes that a physical or mental impairment prevents her from engaging in her previous occupation. The burden then shifts to the Commissioner to show 1) the claimant can perform other substantial gainful activity, and 2) that a "significant number of jobs exist in the national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if her impairments are of such severity that she is not only unable to do her previous work but cannot, considering her age, education, and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

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1 **C. Standard of Review**

2 On review, the court considers the record as a whole, not just the
 3 evidence supporting the ALJ's decision. *Weetman v. Sullivan*, 877 F.2d
 4 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526
 5 (9th Cir. 1980)). The court upholds the ALJ's determination that the
 6 claimant is not disabled if the ALJ applied the proper legal standards
 7 and there is substantial evidence in the record as a whole to support
 8 the decision. *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
 9 (citing 42 U.S.C. § 405(g)); *Brawner v. Sec'y of Health & Human Servs.*,
 10 839 F.2d 432, 433 (9th Cir. 1987) (recognizing that a decision supported
 11 by substantial evidence will be set aside if the proper legal standards
 12 were not applied in weighing the evidence and making the decision).
 13 Substantial evidence is more than a mere scintilla, *Sorenson v.*
 14 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
 15 preponderance, *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir.
 16 1989); *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576
 17 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind
 18 might accept as adequate to support a conclusion." *Richardson v.*
 19 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch
 20 inferences and conclusions as the [ALJ] may reasonably draw from the
 21 evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293
 22 (9th Cir. 1965). If the evidence supports more than one rational
 23 interpretation, the court must uphold the ALJ's decision. *Allen v.*
 24 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

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1 **D. Analysis**

2 Mr. Phengsavanh contests the ALJ's determination that he was not
3 credible in regard to his symptoms and the impact those symptoms have on
4 his daily living and the ALJ resultantly improperly discredited the
5 opinions of his treating physicians, Dr. Dillon and Dr. Boyd, and two
6 examining physicians, Dr. Rotman and Dr. Koretzky, who provided medical-
7 source opinions, while relying too much on the opinions of non-examining
8 physicians Dr. Thomas McKnight and Dr. Matthew Comrie.

9 In regard to the ALJ's credibility determination, the ALJ found
10 based on the medical records, in particular those pertaining to Mr.
11 Phengsavanh's knee and ankle conditions, that Mr. Phengsavanh's
12 allegations regarding his symptoms and the intensity, persistence, and
13 limiting effects of such symptoms were not supported by the medical
14 record and therefore not credible. The Court finds the ALJ appropriately
15 weighed the conflicting evidence in regard to Mr. Phengsavanh's symptoms
16 and the limiting effects of the symptoms. The record supports the ALJ's
17 credibility conclusion. See, e.g., Dr. David Bauer's report, ECF No. 9
18 at 376 ("The claimant's physical examination is not physiologic, with
19 evidence of symptom magnification and pain behaviors.").

20 The Court agrees with Mr. Phengsavanh that the ALJ failed to
21 accurately summarize Dr. Boyd's assessment of Mr. Phengsavanh. The ALJ
22 stated, the "[t]est results from Dr. Boyd notes significant over-
23 reporting/exaggeration." ECF No. 9 at 33. Yet, the ALJ did not recognize
24 in the decision that Dr. Boyd ultimately concluded that Mr.
25 Phengsavanh's reported psychological symptoms and pain complaints were
26 not the result of malingering, see ECF No. 9 at 425. Omitting this

1 information however from the ALJ's written decision is not inconsistent
2 with the entire record as Dr. Boyd did not conclude that Mr. Phengsavanh
3 suffered from a long-term disability but rather that continued
4 psychiatric treatment through both medicine and counseling would be
5 beneficial, and that a return to work would likely improve Mr.
6 Phengsavanh's self-esteem and self-confidence. Accordingly, the ALJ's
7 decision reflects a full consideration of Dr. Boyd's opinions in light
8 of the entire record.

9
10 Mr. Phengsavanh also contends that the ALJ's statement that "[n]o
11 treating or examining physician has indicated that the claimant is
12 unable to work" is factually erroneous. ECF No. 9 at 34. The ALJ did not
13 specifically highlight that Dr. Dillon recommended short-term disability
14 for Mr. Phengsavanh in January 2012, or note that on May 21, 2012, Dr.
15 Dillon stated that due to Mr. Phengsavanh's daughter's death earlier
16 that month that he was "unable to estimate a return to work date for
17 [Mr. Phengsavanh] at this time." ECF No. 9 at 429. Yet, the ALJ
18 explained that Dr. Dillon failed to factually support the basis for his
19 PTSD diagnosis and also noted that Dr. Dillon's assessments relied
20 heavily on Mr. Phengsavanh's subjective exaggeration of his symptoms.
21 The Court finds the ALJ, after weighing the conflicting record,
22 appropriately determined that the evidence did not support a finding
23 that Mr. Phengsavanh was unable to return to work within the next twelve
24 months—the ultimate question that was before the ALJ. See also Dr. David
25 Bot's report, ECF No. 9 at 382 (recommending that it would be in Mr.
26 Phengsavanh's psychological best interest to continue working at a
27 position he is physically capable of performing); and Dr. Naughne Boyd's
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1 report, ECF No. 9 at 34 (recommending that Mr. Phengsavanah be placed on
2 short-term disability for five to six months in order to reduce his
3 stress and anxiety levels before returning to work).

4 The Court also finds that the ALJ's rejection of Dr. Martin
5 Koretzky's and Dr. Elliot Rotman's evaluations of Mr. Phengsavanah was
6 appropriate based on the record. As to Dr. Koretzky, the ALJ highlighted
7 that Dr. Koretzky's opinion that Mr. Phengsavanah was "NOT capable of
8 completing a work week at a consistent pace without disruptions from
9 psychological symptoms" was inconsistent with Dr. Koretzky's other
10 conclusions regarding Mr. Phengsavanah's understanding, memory, sustained
11 concentration and persistence, social interaction, and adaption. ECF No.
12 9 at 456. As to Dr. Rotman, the ALJ determined that Dr. Rotman's
13 opinions relied too heavily on Dr. Dillon's conclusion that Mr.
14 Phengsavanah's symptoms were worse after the death of his daughter and
15 erroneously determined that Mr. Phengsavanah's concentration,
16 persistence, and pace are markedly limited. For these reasons, the ALJ
17 did not fully credit Dr. Rotman's opinions. And while Mr. Phengsavanah
18 submits the ALJ adopted Dr. McKnight's and Dr. Comrie's opinions, the
19 Court finds the ALJ did not fully adopt these physicians' opinions but
20 rather appropriately weighted them against the rest of the medical
21 evidence. Based on a review of the conflicting evidence in the record,
22 the Court finds the ALJ's decision is supported.

23 Here, the ALJ was faced with conflicting medical evidence. The ALJ
24 reviewed the evidence, determined credibility, and resolved the
25 conflicting medical evidence. See *Chaudhry v. Astrue*, 688 F.3d 661, 671
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1 (9th Cir. 2012). The Court finds the ALJ's decision is supported by
2 substantial evidence in the record.

3 **E. Conclusion**

4 For the above-given reasons, **IT IS HEREBY ORDERED:**

5 1. Mr. Phengsavanh's Motion for Summary Judgment, **ECF No. 12**, is
6 **DENIED**.

7 2. The Commissioner's Motion for Summary Judgment, **ECF No. 14**,
8 is **GRANTED**.

9 3. **JUDGMENT** is to be entered in the Commissioner's favor.

10 4. The case shall be **CLOSED**.

11 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
12 Order and provide copies to counsel.

13 **DATED** this 30th day of October 2015.

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16 s/Edward F. Shea
17 _____ EDWARD F. SHEA
18 Senior United States District Judge
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